

be shown to the accused in the circumstances. I therefore sentenced him to ten years' imprisonment.

The accused appealed to the Federal Court. His appeal was dismissed. The judgment of the Federal Court was delivered by:

Thomson L.P. (delivering oral judgment): This is a most unpleasant and unfortunate case and I do not think it calls for discussion of any great length.

The complainant, the prosecutrix, was a little girl of ten and the case is that the present appellant had connection with her in Dungun on 13th March, 1965. By reason of her age the question of consent was immaterial and if there was connection then it was rape.

There is no room for doubt that at about the material date the little girl became infected with gonorrhoea. There is no doubt from the medical evidence that she could have had sexual relations with a man involving partial penetration and there is no doubt that at the material date the appellant was suffering from gonorrhoea.

The girl's story is that it was the appellant who had connection with her and had infected her.

As regards the *factum* of connection with somebody and infection by somebody, her story is corroborated by the medical evidence. As regards identification of the appellant, it is corroborated by the evidence of her foster father, Ravindran, who says that on the night in question the appellant took her to the pictures on his bicycle and the evidence of a man, Tengku Ibrahim, who says that later that evening he saw the girl leaving the neighbourhood of the appellant's room and then being picked up by the appellant and taken on his bicycle in the direction of her own home. If these witnesses were telling the truth, and it was for the trial judge whether to believe them or not, there was thus ample corroboration implicating the appellant.

In all the circumstances of the case we do not think it is a case where we can or should intervene.

As regards the sentence of 10 years' imprisonment, we do not wish to suggest that in our view there was any reason for leniency whatsoever. It was a very serious case and it had to be treated seriously. Nevertheless, we cannot overlook the fact that there was no violence used and the girl has not suffered physical damage that will impair her future chances of marriage.

In the circumstances we feel justified in

A reducing the sentence to one of 7 years' imprisonment.

Appeal dismissed. Sentence reduced.

B SIM POH HO & ORS. v. PUBLIC PROSECUTOR

[A.Cr.J. (Harley J.) February 9, 1966]

[Miri — Criminal Appeal No. K.16 of 1965]

Penal Code, s. 292 — Advertising that an obscene object can be procured from certain persons — Test to be applied — Mens rea — Liability of publishers.

C The appellants who were the publishers of a newspaper had been convicted of publishing an advertisement in their newspaper that obscene photographs could be procured from or through certain persons. The magistrate held that section 292 of the Penal Code had been contravened as a person who answered the advertisement in fact received obscene photographs and as the appellants had been negligent because they did not know of the state of facts until after the prosecution.

D Held: the proper test to be applied in such cases is "Do the advertisements by their wording proclaim that obscene objects can be procured?" and as in this case the learned magistrate had applied the wrong test the appeal must be allowed and the conviction set aside.

Cases referred to:—

- E (1) *Thomson v. Chain Libraries Ltd.* [1954] 2 All E.R. 616.
- (2) *R. v. Hicklin* L.R. 3; Q.B. 360.
- (3) *Lim Chin Aik v. R.* [1963] M.L.J. 50, P.C.
- (4) *Patel v. Comptroller of Customs* [1965] 3 W.L.R. 1229.
- F (5) *Comptroller of Customs v. Western Electric Co. Ltd.* [1965] 3 W.L.R. 1229.
- (6) *Mohamed Ibrahim v. Public Prosecutor* [1963] M.L.J. 289.
- (7) *R. v. Love* [1955] Cr.L.R. 250; 39 Cr.App.R. 30.
- (8) *R. v. De Marny* [1907] 1 K.B. 388.

CRIMINAL APPEAL.

G Y. Y. Chin for the appellants.

D. M. Goodbody for the respondent.

Cur. Adv. Vult.

H Harley J. (read by Lee Hun Hoe J.): By section 292(d) Penal Code it is an offence to advertise that an obscene object can be procured from or through any person. The two appellants in the magistrate's court faced two counts of advertising "to the effect that" obscene photographs could be procured from (1) Miss Kam Lin and from (2) Mr. Yee Sim. I am not sure that the words "to the effect that" should be disregarded as mere surplusage or verbiage. I The inserted words might imply and be intended to imply that although the advertisements did not directly indicate procurement of obscene photographs, yet that was the effect or result of the advertisements. If a secondary meaning only is relied upon, *prima facie* an advertisement would not be of an obscene object. An innuendo

tends to confuse the court (*Thomson v. Chain Libraries, Ltd.*⁽¹⁾). However, no objection has ever been taken to the wording of the charge, and I do not propose to decide this appeal on a technical imperfection. The proper way to interpret the wording of the advertisements will be referred to later in this judgment.

The advertisements were in Chinese, and the English translations are:

(Ex. "E")

"GOOD NEWS FOR COLLECTORS.

The following two books are for sale:—

(1) The Crazy Male and Female — \$2.00

(2) Big Hair meets Small Hair — \$3.00

Four 'good' artistic human photographs will be enclosed free to each book. Also for sale are European, Japanese and Siamese double-person superb artistic photographs for \$3.00 per set of 12, and \$5.00 for post card size.

Write to:—

Miss Kam Lin,

No. 1610, Pasir Pinji, Ipoh, Perak."

(Ex. "C")

"WONDERFUL CHANCE".

ONE STONE TO KILL TWO BIRDS!

18 Asian two-person superb artistic photographs for \$5.00 or 10 for \$3.00. Any purchase exceeding \$5.00 will be given free a jar of Japanese bed-room heavenly drug called 'Night Flower' (sufficient for 10 doses). The nature of the drug is mild and it does not hurt. It makes a young man as strong as a tiger, and an old man young. It is especially good for those who are young but disabled. It works without failure (anyone who finds it does not work will be refunded \$3.00 in cash). Obtainable by correspondence, and additional 65 cts. stamp is required for registered mail. Write to:—

Mr. Yee Sim,

No. 546, Gunong Rapat, Ipoh, Perak."

Be it noted that the charges concerned obscene photographs only, not books or aphrodisiacs, although their inclusion might suggestively indicate the nature of the photographs. The photographs were in fact obscene according to the classical definition given in *R. v. Hicklin*⁽²⁾; it is up to a magistrate to judge this obscenity by looking at the photographs, and not by taking the opinions of others on the point. A police officer (P.W.2) produced the photographs and made the translations of the advertisements (which appeared in a newspaper on 30-12-64); he also gave evidence of their obscene implications:

"By reading this advertisement in Ex. 'C', I have formed the opinion these advertisements were for sale of obscene photographs. Because the words two persons refer to Male and Female person. The words superb artistic photographs suggest male and female in sexual action. The night flower drug clearly indicated a sex stimulation drug.... I now wish to read the next advertisement Ex. 'E'. By reading this advertisement, I have formed the opinion that this advertisement is for the sale of obscene pictures and obscene books. Because the books clearly stated that the Crazy Male and Female and the caption of Big Hair meets Small Hair also

A suggest sexual action for male and female. Again for photographs it suggests double-person means a female and male engaged in sexual action."

B This officer (P.W.2) had extensive English-Chinese education, and was clearly competent to translate from one language to the other, but he should not, in my view, have been accepted as an expert in obscenity. The English versions of the advertisements were for the court to judge and interpret. Moreover the police officer's interpretation of the advertisements was likely to be coloured by post hoc views, since he had previously procured for himself photographs by answering the advertisements.

C The views of the next witness called (P.W.3), would seem to be completely irrelevant since clearly he was not even a language expert. He was allowed to tender the following evidence:

"On 30.12.64 I had read a copy of *Hwa Lian Daily News*. I had come across of two advertisements. 18 copies Far East double persons artistic and exciting photographs.... I was of the opinion that this might be obscene picture as it said that double and artistic. Night Flower would be used for sexual intercourse. In according to this advertisement every Chinese readers understand what the advertisement means..... Double person photographs it would conclude for obscene pictures. I came to conclusion that the two advertisements suggest that the sales for obscene pictures. I have six years in Chinese education I have made use of Chinese language every day. I have no difficulty with the meaning of the two advertisements.

XXD. Accd. No. 1: I am a cashier. I have not been an interpreter.

F Double persons state interesting and exciting from these words it would interest and lead to the meaning of sexual intercourse.... I have read a lot but I had seen obscene picture on board.... I was at least six years standard of Chinese Primary School pre-war days education. I can not tell the accused that the two man and woman inferred with the sexual intercourse as it stated that 'Night Flower'. The picture is in connection with this chemical and therefore it would connect with obscene picture."

G There was evidence, on which the magistrate was entitled to find, as he did find, that the appellants were registered proprietors, printers and publishers of the newspaper in which the advertisements appeared. There was no evidence that they had personal knowledge of the advertisements. They made unsworn statements to the contrary. One of the appellants stated that he had had no active part in the business since April 1964. If *mens rea* failed to be proved, were the appellants to be held liable? Commenting on section 292 of the Penal Code, *Ratanlal* in "The Law of Crimes" 19th Ed. at page 659 observed:

I "Liability of newspaper proprietor for act of his servant.—The mere fact that a person is the proprietor and publisher of a newspaper is not sufficient to render him criminally liable in respect of matter inserted therein by one of his servants. There must be a distinct finding that the matter complained of was inserted by the order or owing to the negligence of the proprietor."

In *Archbold* 34th Ed. at § 3643., it is stated:

"*Libels in newspaper.* By virtue of the Libel Act, 1843, s. 7 (*ante*, § 3623), it has been held that the proprietors of a newspaper, who have appointed a competent editor to conduct it, are not criminally responsible for the publication of a libel inserted by the editor of the newspaper, upon proof by them that the publication of the libel was made without their actual authority, consent, or knowledge, and did not arise from want of due care or caution on their part:...."

The normal rule that *mens rea* is an essential ingredient in every offence has been reinforced recently by the judgments of the Privy Council in *Lim Chin Aik v. R.*⁽³⁾ in *Patel v. The Comptroller of Customs*,⁽⁴⁾ and in *Comptroller of Customs v. Western Electric Co. Ltd.*⁽⁵⁾ On the other hand, Thomson C.J. in *Mohamed Ibrahim v. Public Prosecutor*⁽⁶⁾ held that, in interpreting section 292 of the Penal Code, *mens rea* and intention were not implicit in the offence. The learned Chief Justice (as he then was) referred *inter alia* to cases which concerned the sale of adulterated foods, cases which invoke the test of absolute liability. It might be argued that the adulteration of morals should be treated in the same way as the adulteration of food. Two cases of some importance, however, were not cited before Thomson C.J. From those two cases I quote the following extracts:

"*R. v. Love* (7) (Court of Criminal Appeal: Lord Goddard C.J., Ormerod and Gorman JJ.):

L. was convicted on two counts, the first of conspiring to publish obscene libels in the form of obscene books, and the second of selling, uttering and publishing two obscene libels. In evidence at the trial L. said that he personally had nothing to do with printing of the books, but said that he was willing to take full responsibility. L. was the sole director of the limited company which had printed the books. The learned recorder in summing up to the jury said: "In his (L.'s) evidence he really had disposed of the whole question, because, being the sole director of the company, he is the company; he almost inevitably takes responsibility for what was done. That is what he has said. He takes full responsibility. That, I think, answers the question." L. appealed on the ground, *inter alia*, that the question whether L. knew that the contents of the books were obscene was an essential ingredient of the offences and should have been left to the jury.

Held, allowing the appeal, that the court was bound by *R. v. Allison* (1888), 59 L.T. 933. In that case, which involved the conviction of the directors of a company who had printed a libel, the Court of Crown Cases Reserved emphasised that there was no evidence that the directors knew the contents of the magazine. The direction given by the recorder could not be upheld and the conviction would accordingly be quashed."

"*R. v. De Marny*.⁽⁸⁾ The defendant was tried on an indictment charging him with causing and procuring obscene books and photographs to be sold and published. The defendant had been warned several times by the police authorities that the books, photographs, and other things advertised in his paper in the same terms and by the same persons were of an obscene character. Counsel for the defendant submitted that there was no evidence to go to the jury that the defendant took part in or aided and abetted the selling and publishing of obscene libels as charged in the indictment.

The Common Serjeant held that there was evidence, and directed the jury that if they were satisfied that the books and photographs sent to the police inspector

A in pursuance of the advertisements were obscene, and and that the defendant knew at the time he published the advertisements that they were advertisements for the sale of obscene literature and photographs, and that by the publication of these advertisements he brought about the sale and transmission to the inspector of the books and photographs, they ought to convict the defendant, although he did not know the actual contents of the books or the details of the photographs sent, and that in judging of the defendant's knowledge they might consider not only the evidence of the express warning given to the defendant and the wording of each advertisement, but also the other advertisements appearing in the same issue of the paper.

The jury found the defendant guilty on all counts."

C Lord Alverstone C.J.:...." The defendant for profit to himself inserted in his paper advertisements which give information to readers as to where certain publications can be obtained, and it is found as a fact that the defendant knew that the books and other things advertised were of an indecent character, and if one were at liberty to draw a conclusion from the advertisements themselves, there could be no doubt at all as to that. The Common Serjeant directed the jury in the following terms: [His Lordship read the direction of the Common Serjeant set out above, and continued:—] D In my opinion that direction is stated as favourably as it could be for the defendant. The jury are told that in order to convict the defendant they must be satisfied that the defendant knew the character of the publications referred to in the advertisements, and that by publishing the advertisements he brought about the sale of the publications and other articles referred to. That amounts in ordinary language to aiding or abetting the publication in England of obscene literature, and the sending through the post in England a packet the sending of which is prohibited by the Post Office (Protection) Act, 1884. It would, in my opinion, be a lamentable state of things if the law of this country were not strong enough to deal with a man who has done so much towards bringing about the publication of indecent literature. E The evidence in this case shews that the result of the insertion of the advertisements in the defendant's paper was to give information as to where these things could be obtained to persons who, but for the advertisements, would or might never have known of their existence, and, therefore, it is not going too far to say that the publication was directly brought about by the act of the defendant, and it is further proved that the defendant had knowledge that that would be the consequence of inserting the advertisements in the paper....In my opinion the directions of the Common Serjeant was in accordance with the law."

Even if it be held in the instant case that appellants knew of the publication of the advertisements, or that their ignorance of the fact of publication is immaterial, are the advertisements H such as to imply in their natural and literal meaning that photographs to be procured by answering the advertisements will be obscene? This seems to me the proper test to apply. Suppose, for instance, "Photographs of Greek Sculpture" are advertised, are the newspaper I publishers to blame if obscenities are in fact sent? It is because the magistrate, who tried the present case, imposed the wrong test that his findings cannot be supported. His judgment reads as follows:

"There is no cross-examination being made by the two accused on the evidence given on P.W.2 who is the principal witness in this case although the examination

has been made to P.W.3 in the wording of the advertisement and P.W.3's occupation and Chinese standard of qualification. I am of the opinion that this examination is not relevant to the material fact of the charge made against them. The charges are that the accused have advertised in their daily newspaper two advertisements which would result that any persons following this advertisement can procure any obscene pictures from the two names given and addresses mentioned as stated and published in the advertisement in their daily newspapers. . . . P.W.2 has described to the court how these obscene photographs were being procured by him by means of Registered post and there are no questions from either accused to contest the manner in which these obscene photographs being procured and produced before this court as exhibits. I hold the view that the mere fact that the accused are the proprietors and publisher of a newspaper is not sufficient to render them criminally liable in respect of matter inserted therein by one of their servants. In this particular case, I find that the two accused although they are existing registered proprietors of Hwa Lian Newspaper, have neglected their duty because as it is clearly shown that by their own admission not until their attention being drawn by P.W.2. From the above reason, I find that the photographs are obscene, though advertisement can be procured from or through any persons and in this case through Mr. Yee Sim and Miss Kam Lin. The publication of these advertisements is due to the negligence of the two accused who are the registered proprietors of Hwa Lian Newspaper, Printers and under the Registration of Business. Name of Hwa Lian Daily News. There are no other persons being registered except the two accused. I find the two accused guilty to both charges against them."

Now, as I read the judgment, it seems that the magistrate's views were:

(1) P.W.2 and P.W.3 were both to be regarded as expert witnesses. As P.W.2 was not cross-examined, and P.W.3's qualifications only as translator were questioned therefore their evidence should be accepted in toto.

(2) Appellants were not vicariously liable, but ignorance even of the existence of the advertisements could not be counted in their favour.

(3) Section 292 was contravened, because a person who answered the advertisement in fact received obscene photographs, and appellants were negligent because they did not know of this state of facts until after prosecution.

As I have already said, the proper test is: Do the advertisements by their wording proclaim that obscene objects (photographs) can be procured? It is because the magistrate did not apply this test that I think he went astray. If he had properly directed himself, he might well have concluded that the wording of the advertisements did not promise what was unlawful.

For the above reasons, this appeal is allowed. The convictions are quashed on both counts, and sentences set aside. Fines, if paid, must be returned to the appellants. I agree with the order that the photographs be destroyed.

Appeal allowed.

A LIM TOH SIN v. PUBLIC PROSECUTOR

[F.C. (Wee Chong Jin C.J. (Singapore), Tan Ah Tah F.J. and Chua J.) February 10, 1966]

[Singapore — Federal Court Criminal Appeal No. 43 of 1965]

Criminal Law and Procedure — Trial — Misdirection — Failure to put defence to jury — Courts of Judicature Act, 1964, s. 60 — Criminal Procedure Code, (Cap. 132), s. 166.

The appellant had been convicted for murder. The evidence showed that two persons, one of whom was armed with a gun, took part in a robbery. A detective chased the robbers and while holding one of them he was shot by the other. The issue before the jury was whether the appellant was the robber who shot the deceased. The appellant made a statement admitting to participating in the robbery but stating that he took an inactive part in it. The learned trial judge did not put the defence to the jury and in his summing up he stated that if the jury were satisfied that the appellant was the other robber, that is not the gunman, then it was open to them to find him not guilty of murder.

Held: (1) the summing up in this case was unsatisfactory and there had been a grave misdirection by the trial judge;

(2) by reason of misdirection and the failure to put the defence to the jury on the facts of this particular case the appellant had lost a chance of being found not guilty of murder which was fairly open to him and therefore the conviction for murder must be quashed;

(3) the evidence in this case established beyond any reasonable doubt that the appellant had committed the offence of armed robbery and the court would therefore convict him of that offence.

Cases referred to:—

(1) *R. v. Haddy* [1944] K.B. 442; 29 Cr.App.R. 182.

(2) *Woolmington v. Director of Public Prosecutions* [1935] A.C. 462 at p. 482; 25 Cr.App.R. 72 at 92.

(3) *Stirland v. Director of Public Prosecutions* [1944] A.C. 315; 30 Cr.App.R. 40.

(4) *R. v. Farid* 30 Cr.App.R. 168.

(5) *Begu v. King Emperor* A.I.R. 1925 P.C. 130.

(6) *Quinn and Howland v. R.* [1949] M.L.J. 217, C.C.A.

FEDERAL COURT.

Khoo Hin Hiong for the appellant.

Francis T. Seow (Senior State Counsel) and *Dalip Singh* (Deputy Public Prosecutor) for the respondent.

Wee Chong Jin C.J. (Singapore): The appellant was convicted before Winslow J. at the High Court of the murder of a detective Reddy Melvyn Douglas.

The facts of the case so far as it is necessary to state them are these. On the morning of 11th April 1964 two employees of a trading company after cashing a \$60,000 cheque returned to the office of the company, one of them Chang Meng Chye carrying the cash in an airways travelling bag. As they alighted from a taxi